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Supreme Court, U.S.
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CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER Term, 1986

CHARLES COLEMAN,
Petitioner,
v.
J. D. WHITE, Warden & the
Attorney General of the
State of Alabama,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Did the Court of Appeals err in holding that Petitioner could be found guilty without an evidentiary hearing of "abuse" of the writ of habeas corpus.

(2) Did the Court of Appeals err in holding that "abuse" of the writ of habeas corpus could be determined from the "face of the pleadings?"

(3) Did the Court of Appeals err in holding that Petitioner could be found guilty of "deliberate withholding" or "inexcusable neglect" based solely on

evidence that he was "aware" of the existence of all claims for relief at the time of his previous petitions?

LIST OF PARTIES

All of the parties to this proceeding and the proceedings below are named in the caption and style of this Petition.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The petitioner, Charles Coleman, through his court-appointed counsel, petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit rendered in this case on February 27, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated February 27, 1987, is reproduced in the Appendix hereto at page A-1.

The orders and opinions of the United States district court for the Northern District of Alabama, Southern Division, dated May 2, 1985, December 26, 1984, and August 6, 1985 are reproduced in the Appendix hereto at pages A-14, A-20, and A-25, respectively.

JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit entered February 27, 1987. A rehearing of that judgment and opinion was timely sought and denied on April 7, 1987.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Rule 9(b) of the Rules Governing §2254 Cases and §2255 Proceedings in the United States District Courts, 28 foll. 2254.

> Rule 9. Delayed or Excessive Petitions.
>
> . . .
>
> (b) Successive Petitions. A second or successive petition may be dismissed if the Judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the Judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

Petitioner, Charles Coleman is presently incarcerated in the West Jefferson correctional facility located in Bessemer, Alabama, for convictions based upon the laws of the State of Alabama. Petitioner has brought three petitions for Writs of Habeas Corpus in the United States District Court for the Northern District of Alabama, alleging numerous constitutional defects in his trial and sentencing. The District Court dismissed all three of these petitions without a hearing, and without a determination of the merits. The District Court has never considered the substantive constitutional defects alleged in any of the petitions.

Petitioner's first petition was dismissed for lack of federal subject matter jurisdiction. In the Memorandum Opinion dismissing that petition, the District Court states: "Each of the issues raised by this petitioner involve interpretations of state law and do not present federal constitutional questions. Since federal constitutional questions are not presented to this Court, petitioner is not entitled to the relief he seeks. This petition for habeas corpus is, therefore, due to be dismissed." (A-29).

The petitioner's second petition alleged essentially the same issues as the first, and was dismissed as being repetitious. (A-24). Petitioner's third

petition contained new allegations of constitutional errors at the trial level which were not contained in the prior petitions. His third petition for habeas corpus relief was dismissed as an "abuse of the writ" due to the fact that it contained new grounds which, according to the District Court, could have been brought in the first petition. (A-18).

Petitioner has proffered numerous reasons for his failure to bring all claims of constitutional defect in one petition, but he was never granted an evidentiary hearing as to the merits of these excuses, or his motives for not bringing all claims in his first petition. Since Petitioner's excuses are not germane to the issues raised by this

petition for certiorari, they will not be discussed in detail herein.

In the Eleventh Circuit, a finding of "abuse of the writ" requires a determination by the trial court that the petitioner's conduct and motive for the failure to bring all claims in one petition indicate a "deliberate withholding" of these claims or "inexcusable neglect." Potts v. Zant, 638 F.2d 727, 745 (5th Cir. 1981), cert. denied, 454 U.S. 877 (1981) ("Potts I"), citing, Townsend v. Sain, 372 U.S. 293, 317 (1963).*/ It is well established

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*/ The Eleventh Circuit, in the en banc decision Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

that the habeas petitioner must be allowed "an opportunity to explain his apparent abuse" by showing that his non-assertion of a claim in a prior petition is excusable. See Advisory Committee Note to Rule 9(b); In re Shriner, 735 F.2d 1236, 1240 (11th Cir. 1984).

As further stated by the Eleventh Circuit in Bass v. Wainwright, 675 F.2d 1204, 1208 (11th Cir. 1982), "we [do not] think that a procedure which allows the imposition of forfeiture for abuse of the writ, without allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirements of fairness."

In its Order affirming the District Court's dismissal of Petitioner's third petition, the Eleventh Circuit acknowledged that a "petitioner must be given an opportunity to rebut" an allegation by the state that he has abused the writ. (A-6). But the Court also concluded that a hearing is unnecessary where "the record clearly demonstrates abuse ... ." (A-7) (emphasis added).

Assuming, arguendo, that a sufficient factual record may exist in some cases to "clearly" show an abuse of the writ, therefore obviating the need for an evidentiary hearing, it is still necessary for the District Court to make certain findings of fact from the record

before it can dismiss a petition as abusive. In this case, the District Court did not grant the petitioner a hearing and, most importantly, there are no facts in the record which clearly demonstrate an abuse of the writ.

The District Court's opinion simply indicated that the reason for dismissing the petition was that the constitutional claims brought by the petitioner were "available to him" when he brought his initial petition. (A-18). Even if this is true it does not, standing alone, indicate a "deliberate withholding" or "inexcusable neglect" which must be found in order to dismiss the petition as an abuse. In fact, if this were the standard for "abuse," then virtually

every successive petition would be abusive.

By failing to find any facts in the record or during an evidentiary hearing to show either "deliberate withholding" or "inexcusable neglect," the District Court has so far departed from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision. Further, the District Court's departure has been sanctioned by the Eleventh Circuit which also failed to indicate any facts contained in the record which clearly indicate an "abuse" of the writ under the standard which it had previously adopted.

By affirming the District Court's action of dismissing a successive petition without an evidentiary hearing, and without examining Petitioner's motives and reasons for not bringing all claims in one petition, the Eleventh Circuit has decided an important question of federal law which has not been, but which should be, settled by this Court.

Finally, in holding that a District Court can dismiss a successive petition without an evidentiary hearing and without finding any intent or motive by Petitioner to "vex, harass, or delay," the Eleventh Circuit has decided a federal question in a way in conflict with the applicable decisions of this

Court concerning the doctrine of "abuse" of the writ of habeas corpus.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, and has so far sanctioned such a departure by the District Court, as to Call For an Exercise of This Court's Power of Supervision.

The Eleventh Circuit's Affirmance of the Alabama District Court's Dismissal of the Petition for Writ of Habeas Corpus Contradicts the Established Standards Governing "Abuse" of the Writ of Habeas Corpus

By affirming the opinion of the District Court which was unsupported by any facts to show that petitioner's conduct constituted "inexcusable neglect" or "deliberate withholding," the Court of Appeals has abdicated its duty apply to the legal standards and principles

governing "abuse of the writ." The opinion of the Court of Appeals, like those of the District Court, contains absolutely no discussion of how or why petitioner's failure to bring all claims in one petition was either "inexcusable" or "deliberate."

The Court of Appeals held that "a hearing need not be held where the record clearly demonstrates abuse ... ." (A-7) (citation omitted). Neither the Court of Appeals nor the District Court was able, however, to point to any fact contained in the record, or otherwise, which "clearly" demonstrates "inexcusable neglect" or "deliberate withholding."

To the contrary, the "facts" in the record relied upon by the Court of

Appeals clearly demonstrate Petitioner's attempt to have the new claims contained in his third petition brought by his court-appointed attorney in the State Court of Appeals, and the record just as "clearly" shows Petitioner's apparent belief that he was unable to bring these claims in federal court until he had exhausted his state court remedies. The record simply fails to show the one critical "fact" which is necessary to a finding of "abuse." It nowhere appears in the record that Petitioner knew that he was required to exhaust his state court remedies as to all claims, before he could bring any of them in the District Court. Without addressing that question, neither the District Court nor

the Court of Appeals could determine from the record, or otherwise, whether petitioner's actions were "inexcusable" or "deliberate."

Thus, by failing to provide petitioner with an evidentiary hearing, or, alternatively, to find facts in the record which clearly demonstrate abuse, the District Court has departed from the accepted and usual court of judicial proceedings, and this departure has been so far sanctioned by the Court of Appeals as to call for an exercise of this Court's power of supervision.

II. The Court of Appeals Has Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court

A Dismissal of a Successive Petition for Writ of Habeas Corpus Requires, at Least,

Findings of Facts Which Constitute "Inexcusable Neglect" or "Deliberate Withholding"

This Court has on several occasions set forth standards which govern successive habeas corpus petitions. In Sanders v. United States, 373 U.S. 1 (1963) this Court held that equitable principles, and not the principle of res judicata, govern successive petitions for federal habeas corpus relief.

> Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. The government is always to be accountable to the judiciary for a man's imprisonment, access to the courts on habeas must not be thus impeded. The inapplicability of res judicata, then, is apparent in the very role and function of the writ.

Sanders, 373 U.S. at 8. (citation omitted).

In this case the only "fact" which has been established is that petitioner

brought a "successive" petition which contained new grounds for relief which had not previously been brought. Under the holding by the Court of Appeals, virtually every "successive" petition would constitute an "abuse" of the writ of habeas corpus. There is simply nothing in the record to show why, under equitable principles, petitioner's failure to bring all claims in one petition is "inexcusable" or "deliberate." The fact that those claims may have "existed" at the time of filing the initial petition, or even a finding that the petitioner was "aware" of those claims, does not, standing alone, make his failure to bring them all at one time either "deliberate" or "inexcusable."

The Court of Appeals has, in fact, reintroduced the principle of res judicata into an area which, according to this Court, is to be governed by equitable principles. The Eleventh Circuit cites, as justification for its holding, the "warning" contained in the form habeas petition filled out by the petitioner:

> Caution: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

(A-11). But, there is nothing in the record to show that Petitioner either read or understood this "warning," which is ambiguous best. The "warning" states

only that a petitioner "may" be barred from bringing subsequent claims, and under the equitable principles discussed above, the District Court should have made an actual inquiry into whether Petitioner read and understood this paragraph.

III. The Court Of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court

The decision of the Eleventh Circuit makes clear the lack of quidelines to govern the issue of what constitutes an "abuse" of the writ of habeas corpus. While this court has offered certain guidelines, arising primarily from the decision in Sanders v. U. S., supra, these guidelines are very broad in scope and do not give the lower

Federal Courts sufficient direction with regard to the meaning of "deliberate withholding" and, more specifically, "inexcusable neglect."

As stated previously, there is no way to determine from the record what findings of fact support the District Court's decision to dismiss Petitioner's third petition. The Eleventh Circuit, on the other hand, apparently made an independent review of the record and held that petitioner was guilty of either "deliberate withholding" or "inexcusable neglect," without specifying which. This Court should decide whether it is truly "deliberate" or "inexcusable" when a prisoner, uneducated in the law and acting pro se, while attempting to

exhaust certain claims in a state appellate court, mistakenly brings certain other claims in a petition to a federal District Court. Certainly, if this were done knowlingly and with the intent to abuse the judicial system, it should not be tolerated. But both the District Court, by failing to provide for an evidentiary hearing, and the Eleventh Circuit, in its review of the record, have clearly failed to rule out the many possible excuses for such actions. If the abuse of the writ doctrine is to be governed by equitable principles, as stated by this Court, then the good faith of a petitioner is always an issue which must be examined by the District Court.

The actions of the Petitioner in this

case do not fall within the true meaning of "abuse" as delineated by this Court in Sanders:

> If a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if . . . the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

Sanders, 373 U.S. at 18, (emphasis added). A petitioner who believed in good faith that he could bring some claims in federal court while at the same time attempting to exhaust other claims in

state court cannot be said to have "deliberately withheld" those unexhausted claims.

There is absolutely nothing stated in the opinions of the District Court or of the Eleventh Circuit which would indicate that Petitioner in this case brought a successive petition in order to "vex, harass, or delay." Further, Petitioner cannot be said to have "abandoned" the claims which he was attempting to exhaust in state court, since those claims would have been dismissed anyway under Rule 9(b) if he had brought them in the District Court before exhausting his state court remedies. See Rose v. Lundy, 455 U.S. 509 (1982). As stated by

Justice Brennan, joined by Justice Marshall:

> If the habeas court refuses to entertain a "mixed" petition - as it must under the plurality's view - then the prisoner's "abandonment" of his unexhausted claims cannot in any meaningful sense be termed "deliberate," as that term was used in Sanders. There can be no "abandonment" when the prisoner is not permitted to proceed with his unexhausted claims.

Rose, 455 U.S. at 537 (Brennan, J. concurring in part and dissenting in part).

Clearly, if Petitioner had attempted to bring his "unexhausted claims" in his first federal petition, that petition would have been dismissed under Rule 9(b), and petitioner could not be said to have "abandoned" or "deliberately withheld" those claims. In any event,

petitioner's first federal petition was dismissed because it presented no federal questions cognizable by the District Court.

This case must be distinguished from the situation where a petitioner knowingly, and for some ulterior purpose, brings some of his constitutional claims which are fully heard on the merits by the district court, and then attempts, at a later date, to bring other federal claims which could have been entertained in the first petition. It is this hypothetical, bad faith multiplication of proceedings which the "abuse of the writ" doctrine was intended to prevent, and not the procedural stumblings of a petitioner who, acting in good faith and without benefit of counsel, attempts to negotiate

the perilous labyrinth of federal criminal procedure.

Under the present state of the law, each Court is left to decide for itself what it considers to be "inexcusable." While the Eleventh Circuit found petitioner's actions to be either "inexcusable" or "deliberate," another court might find otherwise. Given the fact that petitioner's liberty is at stake, this Court should impose some guidelines to govern the lower court's decision-making process. In effect, the present "abuse" standard is illusory, since each lower court can determine for itself, with virtually no restrictions, what it finds to be "inexcusable."

In this case Petitioner was found to have "abused" the writ simply as a result

of his presumed "awareness" of all of his claims at the time his previous petitions were brought. No Court has determined that Petitioner had any intent to "vex, harass or delay" the federal courts, or that Petition "deliberately" withheld claims in order to obtain two hearings, or for some other reason. And, no Court has ruled out the possibility that petitioner simply made, in good faith, a procedural mistake which will now foreclose forever any chance of having his claims of constitutional defect heard on the merits.

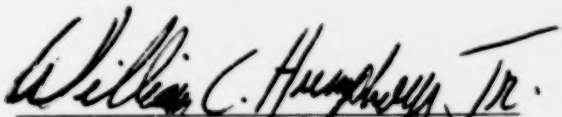
The District Courts have virtually unbridled discretion in deciding what constitutes an "abuse" of the writ of habeas corpus. This Court should impose certain limits to the lower court's

discretion in order to ensure that the "abuse of the writ" doctrine is governed by the equitable principles it has previously enunciated.

CONCLUSION

For these various reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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8735n

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-7310

DO NOT PUBLISH

CHARLES COLEMAN,

Petitioner-Appellant,

versus

J.D. WHITE, Warden & THE ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents-Appellees.

Appeal
from the United States District Court
for the Northern District of Alabama

(February 27, 1987)

Before KRAVITCH, CLARK and EDMONDSON, Circuit Judges.

PER CURIAM:

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Charles Coleman, an Alabama state prisoner, appeals the dismissal as an abuse of the writ of his third petition for habeas corpus. He contends that the district court improperly denied him an opportunity to prove that he was guilty of neither "deliberate withholding" nor "inexcusable neglect" in failing to raise in his earlier petitions the claims he now asserts. We conclude that the district court properly determined from the face of the pleadings that appellants has abused the writ; accordingly, we affirm.

Appellant was convicted in August 1983 of second degree forgery and was sentenced as an habitual offender to twenty-three years in prison. After direct appeal to the Alabama Court of

Criminal Appeals proved unsuccessful, appellant, acting pro se, in June 1984 filed his first petition for federal habeas corpus. The district court dismissed the petition on the merits, concluding that the purported constitutional claims involved only interpretations of state law which previously had been decided against Coleman by the state appellate court. This court denied certificate of probable cause to appeal. In November 1984, appellant filed a second federal habeas corpus petition asserting the same grounds for relief. The district court dismissed the petition as repetitive, and appellant did not appeal.

Appellant subsequently filed in state court a petition for writ of error coram

nobis, in which for the first time he raised the claims contained in the federal habeas petition at issue here. These claims challenged on constitutional grounds the admission of an allegedly coerced confession and of other purportedly tainted evidence, the failure of the trial court to conduct a hearing outside the presence of the jury on the voluntariness of the confession, and the asserted ineffectiveness of his counsel. The state court denied the coram nobis petition, and the Alabama Court of Criminal Appeals refused to hear an appeal.

Shortly after the state appellate court refused the appeal, appellant filed the claims in a third petition for federal habeas corpus. The state

asserted in response that the petition should be dismissed as an abuse of the writ. In reply, appellant contended that the petition was not an abuse of the writ, as the claims could not have been raised in the earlier federal petitions until they were exhausted in state court. Finding that "each of the allegations now made by this petitioner were available to him when he filed his initial petition for habeas corpus attacking this conviction," the district court dismissed the petition, pursuant to Rule 9(b) of the federal rules for habeas corpus proceedings, as an abuse of the writ.

On appeal, appellant contends that the district court improperly denied him an opportunity to prove that the petition

was not an abuse of the writ. He further argues that because he brought these claims as soon as he had exhausted all avenues for relief in state court, he cannot be deemed to have withheld the claims from his earlier petitions either intentionally or by inexcusable neglect. We disagree.

Once the state has alleged abuse of the writ, see Sanders v. United States, 373 U.S. 1, 17, 83 S.Ct. 1068, 1078 (1963), the petitioner must be given an opportunity to rebut the allegation, e.g., In re Shriner, 735 F.2d 1236, 1240 (11th Cir. 1984). Although often a petitioner's rebuttal will raise a factual conflict requiring an evidentiary hearing, see, e.g., Haley v. Estelle, 632 F.2d 1273, 1276 (5th Cir. 1980),[1/] a

hearing need not be held where the record clearly demonstrates abuse, see Potts v. Zant, 638 F.2d 727, 748 (5th Cir. Unit B), cert. denied, 454 U.S. 877 (1981).[2] Here, the district court was warranted in finding that the pleadings in this proceeding and in the previous federal challenges to appellant's conviction[3] demonstrate that appellant's earlier failures to assert the claims were either intentional or the result of inexcusable neglect, and thus constituted abuse of the writ. See, e.g., In re Shriner, 735 F.2d at 1240.

Appellant's only assertion in opposition to the state's allegation of abuse was that the claims raised in the third petition had not been exhausted prior to the filing of the previous

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petitions. Appellant made no claim that at the time he filed the prior petitions he was unaware of the facts supporting the claims now asserted, nor did he contend that he was not then aware that the facts would constitute federal claims. Indeed, attached to his reply was a copy of a 1983 letter to counsel in which appellant had urged that these very claims be asserted in his direct state appeal. Consequently, appellant does not have available either of the two defenses most often asserted in response to a claim of abuse of the writ. See, e.g., Booker v. Wainwright, 764 F.2d 1371, 1376 (11th Cir.), cert. denied, 106 S.Ct. 339 (1985). Appellant argues nevertheless that the petition is not an abuse of the writ because he did not deliberately

withhold the claims from his earlier petitions. He contends that while he was attempting to exhaust these claims in state court he was unaware that the filing of the previous federal petitions might result in the later refusal of the federal courts to hear the unexhausted claims.

We need not now decide when, if ever, a habeas petitioner's failure to assert certain claims in an initial petition might be excused by the petitioner's good faith attempts to exhaust these claims in state court. See Rose v. Lundy, 455 U.S. 509, 520-21, 538 & n.*, 102 S.Ct. 1198, 1204-05, 1213 & n.* (1982) (1981) (Supreme Court divided four votes to four, with Justice Stevens not reaching the issue, over whether abuse of the writ

would be likely result where habeas petitioner first asserts exhausted claims and then files successive petition after exhausting remaining claims). But see Rudolph v. Blackburn, 750 F.2d 302, 305 (5th Cir. 1984) (excuse of unexhaustion "inadequate as a matter of law"). For here it is readily apparent that although appellant was aware of the claims he now asserts, he did not present them for state court determination until after his initial federal petitions were denied. Moreover, appellant cannot in good faith claim that he was ignorant of the likelihood that subsequent federal habeas claims could be barred as a result of his assertion of some claims prior to the exhaustion of his remaining claims. The form habeas petition used by appellant in

all three federal proceedings clearly warned:

> Caution: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date. (Emphasis added).

We are hesitant to require pro se petitioners to precisely follow at their peril the intricate procedural rules of federal habeas corpus jurisprudence. The pleadings in this case demonstrate, however, that a petitioner with an obvious legal proficiency chose deliberately to assert one set of habeas claims despite his awareness that he then had available claims that had not been exhausted in state court. Only after his

initial federal attack on his conviction failed did he launch a second wave of assaults. "Nothing in the tradition of habeas corpus requires the federal courts to tolerate [such] needless piecemeal litigation . . . ." Sanders, 373 U.S. at 18, 83 S.Ct. at 1078.

The order of the district court dismissing the petition pursuant to Rule 9(b) of the federal habeas corpus rules is AFFIRMED.

1/ The Eleventh Circuit, in the en banc decision Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

2/ The Eleventh Circuit, in Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982), adopted as precedent decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981.

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3/ Because the court did not look beyond the pleadings, we need not consider the degree to which the procedures for summary judgment under Fed. R. Civ. P. 56(c) might be applicable to dismissals for abuse of the writ under habeas Rule 9(b). Cf. Hill v. Linahan, 697 F.2d 1032 (11th Cir. 1983) (per curiam) (summary judgment procedures applicable where state introduces external evidence in support of motion to dismiss habeas petition under habeas Rule 9(a)).

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHARLES COLEMAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	CV 85-A-853-S
	)	
J. D. WHITE, Warden; ATTORNEY GENERAL OF THE STATE OF ALABAMA,	)	
	)	
	)	
	)	
Respondents.	)	

FILED MAY 2, 1985
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

ENTERED MAY 2, 1985

J U D G M E N T

In conformity with the Memorandum Opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED and DECREED that the petition for habeas corpus filed in this action be and the same hereby is DISMISSED.

DONE this 2nd day of May, 1985.

/s/ C.W. ALLGOOD
SENIOR JUDGE

3816V

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHARLES COLEMAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	CV 85-A-853-S
	)	
J. D. WHITE Warden; ATTORNEY GENERAL OF THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

FILED MAY 2, 1985
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

ENTERED MAY 2, 1985

MEMORANDUM OPINION

Charles Coleman, petitioner, is an inmate of the West Jefferson Correctional Facility serving a sentence of twenty-three years imposed upon him in the Circuit Court of Jefferson County, Alabama. On August 3, 1983, petitioner

was sentenced to confinement for a period of twenty-three years for the offense of forgery; this sentence was imposed pursuant to the Alabama Habitual Offender Act.

Petitioner has submitted to this court this his third petition for habeas corpus attacking this conviction. In CV 84-A-1619-S, petitioner's habeas corpus action was considered and dismissed on its merits. In CV 84-A-2766-S, the petition for habeas corpus attacking the aforesaid conviction was dismissed as repetitious.

In the instant petition, petitioner asserts that his conviction was obtained by use of tainted evidence, his oral confession was received in evidence

erroneously, he received ineffective assistance of counsel, and he was advised by detectives that no criminal charges would be brought against him. Each of the allegations now made by this petitioner were available to him when he filed his initial petition for habeas corpus attacking this conviction. The piecemeal attack made by this petitioner upon his conviction is barred by Rule 9(b), Rules Governing § 2254 Proceedings. The court concludes that the instant petition for habeas corpus is an abuse of the writ and is therefore due to be denied pursuant to Rule 9(b), Rules Governing § 2254 Proceedings. An appropriate judgment will be entered.

DATED this 2nd day of May, 1985.

/s/ C. W. ALLGOOD
SENIOR JUDGE

3836V

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHARLES COLEMAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	CV 84-A-2766-S
	)	
WARDEN J. D. WHITE and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

FILED Dec. 26, 1984
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

ENTERED DEC. 27, 1984

J U D G M E N T

In conformity with the Memorandum Opinion filed contemporaneously herein, it is hereby ORDERED, ADJUDGED and DECREED that this action be and the same hereby is DISMISSED.

3836V

DATED this 26th day of December, 1984.

/s/ C. W. ALLGOOD
SENIOR JUDGE

3836V

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHARLES COLEMAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	CV 84-A-2766-S
	)	
WARDEN J. D. WHITE and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

FILED DEC. 26, 1984
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

ENTERED DEC. 27, 1984

MEMORANDUM OPINION

Charles Coleman, petitioner, has submitted to the Clerk of this Court this his tenth pleading. The instant action is a petition for habeas corpus filed pursuant to 28 U.S.C. § 2254. In this petition for habeas corpus, petitioner

attacks a sentence of 23 years imposed upon him in the Circuit Court of Jefferson County, Alabama, on August 3, 1983, for the offense of possession of a forged instrument in the second degree. As grounds for federal habeas relief, petitioner alleges the following: Petitioner's rights to due process and equal protection were violated and also his Sixth Amendment rights were violated in that the check which was the basis for the charge against petitioner was void on its face leaving the accused unaware of the nature and cause of the charge against him..

This identical issue was considered by this court in Case No. CV 84-A-1619-S. In the earlier case, it was pointed out that since the issue involved

an interpretation of state law and since the identical issue had been decided adversely to the petitioner by the appropriate appellate courts of the State of Alabama, the district court would not further consider the merits of the petition. This is a repetitive petition for writ of habeas corpus. A U.S. district court is not required to consider a second petition for habeas corpus filed by a state prisoner raising an issue which has previously been ruled upon.

This petition for habeas corpus is due to be dismissed. An appropriate judgment will be entered.

DATED this 6th day of August, 1984.

/s/ C. W. ALLGOOD
SENIOR JUDGE

3816V

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHARLES EDWIN COLEMAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	CV 84-A-1619-S
	)	
WARDEN J. D. WHITE and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,	)	
	)	
	)	
Respondents.	)	

FILED AUG. 6, 1984
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

ENTERED AUG. 6, 1984

J U D G M E N T

In conformity with the Memorandum Opinion filed contemporaneously herein, it is hereby

ORDERED, ADJUDGED and DECREED that the petition for habeas corpus filed by Charles Edwin Coleman pursuant to 28

3836V

U.S.C. § 2254 be and the same hereby is DISMISSED.

DATED this 6th day of August, 1984.

/s/ C. W. ALLGOOD
SENIOR JUDGE

EXHIBIT "A"

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHARLES EDWIN COLEMAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	CV 84-A-1619-S
	)	
WARDEN J. D. WHITE and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

FILED AUG. 6, 1984
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDERGRIFT, Clerk

ENTERED AUG. 6, 1984

MEMORANDUM OPINION

Charles Edwin Coleman, petitioner, has submitted to this court a petition for habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner is an inmate of the West Jefferson Correctional

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Facility serving a sentence imposed upon him in the Circuit Court of Jefferson County. On August 3, 1983, petitioner was sentenced to 23 years after he was convicted of the offense of second degree forgery. Following petitioner's conviction, an appeal was perfected on his behalf to the Alabama Court of Criminal Appeals. Petitioner's conviction was affirmed.

As grounds for federal habeas relief, petitioner alleges that he was denied due process in that the indictment was void on its face. Petitioner contends that his sentence is invalid because of the failure to provide a presentence hearing. Lastly, petitioner contends that the evidence was insufficient to prove each element of the offense charged.

Each of the grounds now asserted by

this petitioner as a basis for federal habeas relief were relied upon by him on direct appeal. This court does not sit as a super appellate state court. Cronnon v. State of Alabama, 587 F.2d 246 (5th Cir. 1979). Each of the issues raised by this petitioner involved interpretations of the state law and do not present federal constitutional questions. Since federal constitutional questions are not presented to this court, petitioner is not entitled to the relief he seeks. This petition for habeas corpus is, therefore, due to be dismissed. An appropriate Judgment will be entered.

DATED this 6th day of August, 1984.

/s/ C. W. ALLGOOD
SENIOR JUDGE

18 16 V

Supreme Court, U.S.
FILED
SEP 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1971

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

CHARLES COLEMAN,

PETITIONER,

VS.

J.D. WHITE, WARDEN,
ATTORNEY GENERAL OF ALABAMA,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OF

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL

JAMES B. PRUDE
ASSISTANT ALABAMA ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THIS PETITION ON THE GROUND OF ABUSE OF THE WRIT WHEN PETITIONER HAD ATTACKED THIS CONVICTION IN THREE PREVIOUS WRITS WHICH CONTAINED OTHER ALLEGATIONS AND WERE DISMISSED EITHER FOR LACK OF MERIT OR FOR BEING REPETITIOUS? YES

II.

WHETHER THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT? NO

III.

WHETHER THIS PETITION PRESENTS ANY ISSUE OF FEDERAL LAW WHICH REQUIRES A DETERMINATION BY THIS COURT? NO

PARTIES

All of the parties to this proceeding are contained in the caption and style of this petition.

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NO. 86-1971

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

CHARLES COLEMAN,

PETITIONER,

VS.

J.D. WHITE, WARDEN,
ATTORNEY GENERAL OF ALABAMA,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION
TO THE PETITION

OPINIONS BELOW

The opinion of the United State Court of Appeals for the Eleventh Circuit is reproduced in the Petitioner's petition for certiorari.

The Memorandum Opinion and the Judgement of the district court are

reproduced in Petitioner's petition for certiorari and will be omitted from Respondents' brief in opposition.

JURISDICTION

Authority for this Court to review the judgement of the Eleventh Circuit Court of Appeals is contained in 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Rule 9(b), Rules Governing §2254 cases [statute is reproduced in Petitioner's brief].

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case is substantially correct and is hereby adopted as Respondents' Statement of the Case subject to the following addendum:

Petitioner offered only one explanation for his failure to include his present claims of constitutional defects in his prior petitions: he stated that he did not include them because they had not been presented to state court for exhaustion before the prior petitions were filed.

REASONS FOR DENYING THE PETITION

I.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE STATE MET ITS BURDEN OF PROVING THAT PETITIONER HAD ABUSED THE WRIT BY FAILING TO INCLUDE THE PRESENT GROUNDS IN THE PRIOR PETITIONS.

Petitioner cites Potts v. Zant, 638 F.2d 727, 745 (5th Cir. 1981) for the proposition that, "a finding of 'abuse of the writ' requires a determination by the trial court that the petitioner's conduct and motive for the failure to bring all claims in one petition indicates 'a deliberate withholding' of these claims or 'inexcusable neglect'". However, a finding that Petitioner had no valid reason for not including these claims in the prior petition was implicit in the District Court's decision to dismiss the

petition on the ground of abuse of the writ.

In its Memorandum Opinion, the district judge noted that this was Petitioner's third petition attacking this conviction. [See copy of the Memorandum Opinion reproduced at A-17 of Petitioner's brief for certiorari]. The district judge duly noted that each allegation contained this third petition could have been included in the initial petition. Having determined that the claims could have been brought, the only remaining determination was whether Petitioner had a valid legal excuse for not including them. See Daniels v. Blackburn, 763 F.2d 707 (5th Cir. 1985), wherein the court stated: "The proper inquiry in determining whether a habeas petitioner has abused the writ by failing

to raise claims in a prior habeas petition is not whether the petitioner intended to waive the claims, but whether he withheld them without legal excuse."

The Eleventh Circuit did not depart from established judicial standards in order to affirm the district court's decision. In response to the Respondents' allegation of abuse of the writ, Petitioner alleged that he had withheld these claims from the earlier petitions because they had not been exhausted in state court when the earlier federal petitions had been filed. Under the prevailing standards, this excuse was clearly an inadequate justification for failure to include the claims in the earlier petitions. See Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983). The sole fact that the new claims were unexhausted

when the earlier federal writ was prosecuted will not excuse their omission." Id at 168. In addition, the court in Jones, supra, stated:

> "We hold only that a petitioner who has persisted in the prosecution of a federal writ while aware of additional but unexhausted claims faces the hurdle of disproving abuse when in a successive petition he presents the omitted claims." Id at 169.

See also Rudolph v. Blackburn, 750 F.2d 302 (5th Cir. 1984). While Petitioner argues that neither the Eleventh Circuit nor district court was able to point to any fact which supported the district court's decision, it should be recognized that Petitioner's explanation of his decision to withhold the present claims from the prior petitions was inself a sufficient "fact" from which the Court could find "inexcusable neglect" as a matter of law.

II.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH ANY APPLICABLE DECISIONS OF THIS COURT.

The decision of the Eleventh Circuit is in compliance with the letter and spirit of Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). In Sanders, the Court stated:

> "if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.... Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." Id.

This principle of Sanders was formally adopted and codified in Rule 9(b) of 28 U.S.C. §2254. Clearly, the purpose of this rule was to prevent prisoners from doing exactly what Petitioner had done in this case: deliberately withholding possible federal claims from the first petition with the notion of presenting those claims in a subsequent petition.

Petitioner argues that the district court's dismissal of this present petition constituted res judicata in violation of Sanders, supra. However this is incorrect. The claims presented in the present petition were totally new claims and the district court did not dismiss them on the ground that the claims had already been examined in a prior petition. ie. res judicata. Rather, the district court refused to

consider the merits of the claims after the court had determined that the claims could have been raised in the prior petitions. This decision did not breach the equitable principles of Sanders, supra, on which Petitioner relies.

Petitioner also argues that he was unaware that his failure to include all grounds asserted for relief in the earlier petitions would bar him from asserting withheld claims in a later petition. However, the record refutes this claim. The form habeas petition used by Petitioner in all of his federal proceedings warned that he must set forth all grounds for relief in the petition because he could be barred from presenting additional grounds in a subsequent petition. [Eleventh Circuit Court of Appeals' Opinion, page 7]. Not

only was the Court of Appeals correct in finding that Petitioner was sufficiently advised of his need to assert all grounds for relief, the Court of Appeals could also take notice of a previous case wherein both it and the same district court judge who decided this present petition had recognized that Petitioner had a "demonstrated proficiency in drafting and filing petitions for habeas corpus", Coleman v. White, No. 85-7389 (11th Cir. Dec. 13, 1985). The Court of Appeals was clearly correct in holding this Petitioner to a higher standard than it would probably apply to prisoners who are strangers to the federal habeas proceedings.

III.

THE PETITION PRESENTS NO IMPORTANT ISSUE OF FEDERAL LAW WHICH REQUIRES A DETERMINATION BY THIS COURT.

Petitioner seeks review of his petition on the ground that the guidelines in Sanders v. U.S., supra, are too broad to give the lower federal courts sufficient direction with regard to the meaning of "deliberate withholding" or "inexcusable neglect". However, contrary to the idea implicit in this assertion, the Circuit Courts, in particularly the Fifth Circuit, are fairly consistent in their interpretation that Sanders prohibits a petitioner from pursuing exhausted claims in an initial federal petition and then attempting to pursue the additional claims in a second petition only after the initial petition

has been denied. See Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983); Rudolph v. Blackburn, 750 F.2d 302 (5th Cir. 1984). Sanders needs no clarification on this issue.

Petitioner argues that he did not understand the "abuse of the writ" doctrine and therefore, his conduct could not have amounted to inexcusable neglect. He further argues that he was acting pro se and was uneducated in the law. However, the Court of Appeals considered this argument and dismissed it because it was obvious that Petitioner understood the doctrine of exhaustion very well. The Court of Appeals noted that even though Petitioner was aware of his need to exhaust state remedies before submitting them to the federal court, Petitioner did not attempt to exhaust

them until after his initial federal petitions were denied. [Court of Appeals' Opinion, page 6]. In addition, as earlier noted in this brief, the Court had, in a previous case, recognized Petitioner's proficiency in habeas corpus law. See Coleman v. White, supra. There was simply no excuse for Petitioner's failure to raise the claims in the earlier petitions.

Petitioner attempts to justify his failure to raise the unexhausted claims in the prior petitions on the ground that, had the unexhausted claims been raised along with the exhausted claims, the earlier petitions would have been subject to dismissal under Rose v. Lundy, 455 U.S. 509 (1982). Therefore, Petitioner reasons, since he could not have brought the unexhausted claims at

the time the exhausted claims were presented, he cannot be said to have "abandoned" or "deliberately withheld" those unexhausted claims. However, as the Court of Appeals noted, this question need not be addressed in this case because it is obvious that Petitioner had no intention of presenting these unexhausted claims for federal review until after the federal court had denied the prior petitions. Petitioner's excuse for unexhaustion was inadequate as a matter of law. Petitioner's situation is unlike Rose, supra, because a "mixed petition" is at least evidence that the prisoner is attempting to present all possible claims for review. The facts of this case establishes very clearly that there was no excuse for Petitioner's failure to either exhaust his state

remedies before filing his initial federal petition or failure to include all of his claims in the initial petition even if his petition would have been "mixed". In such a case, the district court could have instructed the Petitioner to exhaust his state remedies as to all claims prior to seeking federal review of any of his claims. This would ensure that the Court would have to review only one petition. By withholding his claims, the Petitioner attempted to obtain three federal reviews of his conviction and his conduct can be considered nothing short of abuse of the writ.

Lastly, Petitioner argues that the District Court should have given him an opportunity to explain to the Court why he failed to include the grounds in the prior petition. However, an evidentiary

hearing was not needed for the Petitioner to respond to Respondents' allegation of abuse which was made in Respondents' return.

Petitioner had adequate time and opportunity to respond to Respondents' allegation, and in fact, did respond by alleging that he had not abused the writ because the grounds were being exhausted in state court. The district judge was strictly within his discretion in dismissing the petition without a hearing because "[i]f the answer is inadequate, the Court may dismiss the petition without further proceedings." Potts, [I], supra. There was no "substantial conflict" between the allegations of Respondents and Petitioner as to the reasons for the exclusion of the grounds and there was no need for a hearing to determine the "actual facts" involved.

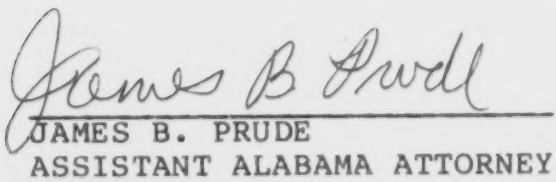
Potts, I, supra; Potts v. Zant, 734 F.2d 526 (11th Cir. 1984), [Potts, II]; Price v. Johnston, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed.2d 1356 (1948). The Court of Appeals was correct in deciding that the district court did not err by failing to grant an evidentiary hearing.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL
BY-



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ASSISTANT ALABAMA ATTORNEY GENERAL

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(205) 261-7300

CERTIFICATE OF SERVICE

I, James B. Prude, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this 1st day of September, 1987, I did serve the requisite number of copies of the foregoing on the Attorney for the Petitioner, by mailing the same to said attorney, first-class postage prepaid and addressed as follows:

Honorable William C. Humphreys, Jr.
Alston & Bird
35 Broad Street
Atlanga, Georgia 30335

James B. Prude

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